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September 10, 2004

By Overnight Courier

Donald S. Clark, Secretary
Office of the Secretary
Federal Trade Commission
Room H-159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580



Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Secretary Clark:

Enclosed please find an original and twelve (12) copies of the Comments of KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island, filed electronically with the Commission on Friday, September 10, 2004 in this proceeding. Also enclosed, please find an electronic copy of the Comments of KeySpan Energy Delivery New York and KeySpan Energy Delivery Long Island, filed electronically with the Commission on Friday, September 10, 2004 in this proceeding.

Kindly acknowledge receipt of the enclosed by date stamping a copy of this letter and return it to me in the enclosed postage-paid envelope.

Yours truly,

Kristina Nifora
Attorney for KeySpan
Energy Delivery New York
and KeySpan Energy
Delivery Long Island



FEDERAL TRADE COMMISSION

CAN-SPAM Act Rulemaking

Project No. R411008

COMMENTS OF KEYSPAN ENERGY DELIVERY NEW YORK AND KEYSPAN ENERGY DELIVERY LONG ISLAND

INTRODUCTION

On August 13, 2004, the Federal Trade Commission ("Commission") published a Notice of Proposed Rulemaking ("NPRM") containing proposed regulations establishing criteria for determining the "primary purpose" of an email message under the CAN-SPAM Act.¹ The Commission based the proposed regulations on the Commission's law enforcement experience and on comments received in response to an Advance Notice of Proposed Rulemaking ("ANPR"), published March 11, 2004, which sought comments on numerous issues raised by the CAN-SPAM Act, including the definition of the term "primary purpose."²

The NPRM invites comments to assist the Commission in determining whether the proposed regulations strike the appropriate balance between maximizing protections for email recipients and avoiding the imposition of unnecessary compliance burdens on legitimate industry.³ In the NPRM, the Commission's proposal includes three criteria in determining the primary purpose of an email message, which apply in specified circumstances, and focus on what the recipient of the message would reasonably interpret

¹ Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 50,091 (Notice of Proposed Rulemaking August 13, 2004).

² Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 11,776 (Advance Notice of Proposed Rulemaking March 11, 2004).

³ Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 50,091 (Notice of Proposed Rulemaking August 13, 2004), page 6.

the primary purpose to be.⁴ The proposed first criteria concern email messages that contain commercial content only, the proposed second criteria concern email messages that contain transactional or relationship content as well as commercial content and the proposed third criteria concern email messages that contain commercial content and other content.⁵

The Brooklyn Union Gas Company d/b/a KeySpan Energy Delivery New York and KeySpan Gas East Corporation d/b/a KeySpan Energy Delivery Long Island (collectively, “KeySpan”),⁶ which is a public utility company, supports the Commission’s effort to strike a balance between maximizing protections for email recipients while avoiding the impositions of unnecessary compliance burdens on legitimate industry. KeySpan generally supports and agrees with the Commission’s proposed first criteria and the portion of the proposed second criteria regarding the placement of the transactional or relationship content in the body of the email message. However, KeySpan respectfully disagrees with the portion of the proposed second and proposed third criteria, that deem an email message commercial if a reasonable recipient would conclude from the subject line alone that the email advertises or promotes a product or service, and requests that the Commission remove that portion from the proposed second and proposed third criteria. If the Commission disagrees with the request, than in the alternative KeySpan requests that the Commission include some guidelines or criteria in determining whether a subject line of an email message would be determined by a reasonable recipient as advertising or promoting a product or service.

⁴ *Id.* at 8.

⁵ *Id.* at 8.

⁶ KeySpan Energy Delivery New York provides gas distribution services to customers in the New York City boroughs of Brooklyn, Staten Island and a portion of Queens. KeySpan Energy Delivery Long Island provides similar services to customers on Long Island and the Rockaway Peninsula in Queens.

KeySpan respectfully disagrees with the proposed third criteria, providing that the primary purpose of an email message would be deemed commercial if a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service. In the alternative, KeySpan requests that the Commission provide more concrete criteria or guidelines in determining whether a recipient reasonably interpreting the body of the message would likely conclude that the body of the message advertises or promotes a product or service. In addition, KeySpan respectfully requests that the Commission include a safe harbor provision pertaining to the proposed third criteria where a sender's intent is considered in determining the net impression of email messages that contain commercial content and other content. Finally, KeySpan does not support the Commission's suggestion that a message may be deemed to have a commercial primary purpose if the message creates a false net impression that the message is noncommercial because it is deliberately structured to do so.

KeySpan hereby submits its comments in response to the Commission's NPRM.

DISCUSSION

The Proposed First Criteria That Deem Email Messages Containing Only Commercial Content As Having A Commercial Primary Purpose, Protect Email Recipients And Is A Clear Standard For Legitimate Industry To Apply

KeySpan supports and agrees with the Commission's proposed first criteria that deem email messages containing only commercial content as having a commercial primary purpose. KeySpan agrees that if an email contains only commercial content, it is clear that the primary purpose of the email is to promote or advertise a product or service and thus triggers the requirements of the CAN-SPAM Act. Since such criteria trigger the

requirements of the CAN-SPAM Act, email recipients will be protected from unsolicited commercial email messages. Under the proposed first criteria, the standards and requirements as to when legitimate industry is to apply the CAN-SPAM Act are clear and do not result in any unnecessary compliance burdens.

KeySpan Supports The Portion Of The Proposed Second Criteria Regarding The Placement Of The Transactional Or Relationship Content In The Body Of The Email Message

KeySpan supports and agrees with the portion of the Commission's proposed second criteria that deem email messages containing commercial content and transactional or relationship content as having a commercial primary purpose if the message's transactional or relationship content does not appear at or near the beginning of the message. The proposed second criteria permit senders to continue sending transactional or relationship messages, which Congress has determined consumers would like to receive,⁷ and permit the senders to include commercial content in such messages.

KeySpan agrees that by requiring the transactional content to appear at or near the beginning of the email message, consumers will be protected by being able to quickly identify messages that have transactional or relationship content without first having to wade through commercial content.⁸ Requiring transactional or relationship content to appear at or near the beginning of the email message indicates that the primary purpose of the message is not commercial and prevents senders from taking advantage of their business relationships by using these types of messages to send commercial messages that do not comply with the CAN-SPAM Act.⁹ KeySpan also agrees with other ANPR

⁷ Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 50,091 (Notice of Proposed Rulemaking August 13, 2004) page 12.

⁸ *Id.*

⁹ *Id.*

commenters that bona fide senders of “messages with transactional or relationship content will not abuse their ability to communicate with customers via email by sending unnecessary transactional or relationship messages” that are weighed down with commercial content.¹⁰ KeySpan believes that this portion of the proposed second criteria is clear, protects recipients, and does not result in any unnecessary compliance burdens.

While KeySpan believes that the portion of the proposed second criteria regarding the placement of the transactional or relationship content in the body of the email message containing commercial content and transactional or relationship content is clear, KeySpan would like the Commission to clarify that sending legally required notices to existing customers¹¹ and directing customers to a company’s website where customers can do business¹² is content that falls under the CAN-SPAM Act’s definition of transactional or relationship messages. In order to determine that an email message containing commercial content and transactional or relationship content has a transactional or relationship primary purpose, triggering the proposed second criteria, the sender first needs to determine whether the email message contains content that is defined as transactional or relationship under the CAN-SPAM Act.

KeySpan respectfully requests that the Commission confirm that sending legally required notices to existing customers are transactional, not commercial messages. As a public utility company, KeySpan is legally required to send notices to existing

¹⁰ *Id.* at 11.

¹¹ For example, under the Home Energy Fair Practices Act (“HEFPA”), New York Public Service Law Section 38, and the New York State Public Service Commission’s regulations implementing HEFPA (16 N.Y.C.R.R. §§ 11.11, 11.17), utilities are mandated to offer and inform customers about a Balanced Billing Program where a customer’s consumption is spread out over the year and the customer is billed the same amount every month.

¹² For example, and email sent to existing customers directing customers to a portion of KeySpan’s website where customers can view their account information online.

customers.¹³ KeySpan believes that email messages containing legally required notices sent to existing customers are transactional or relationship messages because these notices provide information about a sender's product or service the customer purchased, used or is using, relate to a commercial transaction or relationship that the recipient has already agreed to enter into, and contain information that the law has determined important by legally requiring them. KeySpan believes that legally required notices are not commercial messages because the sender of such notices is not promoting a product or service in order to make a profit or increase business.

KeySpan also respectfully requests that the Commission confirm that emails directing customers to KeySpan's website where customers may do business are transactional, not commercial messages. KeySpan believes that email messages that direct customers to KeySpan's website where customers may do business are transactional or relationship messages because these emails are informing customers that they may complete or confirm a commercial transaction that the customer previously agreed to. An example of such a transactional or relationship message is an email sent to an existing customer directing the customer to a portion of KeySpan's website where the customer can view their account information online. KeySpan believes email messages directing customers to a company's website where they can do business are not commercial messages because these emails are assisting customers in completing transactions they previously have agreed to or confirming information about transactions they previously have agreed to and are not promoting a product or service in order to make a profit or increase business.

¹³ See *supra* note 11.

KeySpan Disagrees With The Portion Of The Proposed Second and Third Criteria Providing That The Primary Purpose Of An Email Message Be Determined By The Subject Line Of The Message

KeySpan disagrees with the portion of the Commission's proposed second criteria and the portion of the proposed third criteria that provide that an email message containing commercial content and transactional or relationship content or an email message containing commercial content and other content, be deemed to have a commercial primary purpose if a reasonable recipient interpreting the subject line would conclude that the message advertises or promotes a product or service. KeySpan believes that a subject line of an email message should not dictate the categorization of the entire message, since it is only a snapshot of the message.

While KeySpan agrees with the Commission that bona fide email senders, when advertising or promoting a product or service would likely highlight that fact in the subject lines so that recipients may decide whether to read the messages,¹⁴ KeySpan believes that basing whether an advertisement has a commercial primary purpose on what a reasonable recipient would conclude in viewing the subject line of the email message alone, is subjective and will create uncertainty on the part of legitimate industry sending email messages. Since the subject line of a message does not contain much space and needs to be concise so that a recipient will read the subject line, creating a criterion based on whether a recipient would conclude from the subject line alone whether the message's primary purpose is commercial or not would result in inaccurate conclusions. In addition, since this portion of the proposed second criteria and the proposed third criteria are not clear, an unnecessary administrative burden will result on the part of legitimate

¹⁴ Project No. R411008, Definitions, Implementation, and Reporting Requirements Under the CAN-SPAM Act, 69 Fed. Reg. 50,091 (Notice of Proposed Rulemaking August 13, 2004) page 11.

industry trying to determine, through focus groups and surveys, whether a reasonable recipient would conclude from the subject line of an email that the primary purpose of the email is to advertise or promote a product or service. KeySpan, therefore believes that the primary purpose of the message should be determined based on the message itself and not just a portion of the message, such as the subject line.

KeySpan respectfully requests that the Commission remove the portion of the proposed second and proposed third criteria which would have an email message deemed commercial if a reasonable recipient in viewing the subject line alone would conclude that the email is an advertisement or promotion of a product or service. If the Commission disagrees with the request, than in the alternative KeySpan respectfully requests that the Commission include some criteria or guidelines in determining whether a subject line of an email message would be determined by a reasonable recipient as advertising or promoting a product or service.

The Portion Of The Proposed Third Criteria That Deem Email Commercial If A Reasonable Recipient Interpreting The Body Of The Email Would Conclude The Primary Purpose Of The Email Is To Advertise Or Promote A Product Or Service, Creates Uncertainty And An Unnecessary Compliance Burden

KeySpan respectfully disagrees with the proposed third criteria, that provides that the primary purpose of an email message would be deemed commercial if a recipient reasonably interpreting the body of the message would likely conclude that the primary purpose of the message is to advertise or promote a product or service, because it creates uncertainty as well as an unnecessary compliance burden. Even though the Commission includes factors, such as the placement of the commercial content at or near the beginning of the body of the message, the proportion of the message dedicated to commercial content, and how color, graphics, type size, and style are used to highlight

commercial content as relevant to interpreting whether a reasonable recipient would conclude from the body of the message that the primary purpose is commercial, KeySpan believes that the criteria and the relevant factors are too subjective and do not provide sufficient objective guidance to senders sending messages that contain commercial content and other content from giving an unintended net impression that the primary purpose of the email is commercial. KeySpan is concerned that a bona fide sender may send an email message containing both commercial content and other content with an informational primary purpose to recipients, believing that reasonable recipients would interpret the email as noncommercial, only to find, after the fact, that reasonable recipients concluded that the email had a commercial primary purpose, which would cause the unintended result of violating the CAN-SPAM Act. KeySpan is also concerned that this unintended result would occur in spite of the proposed relevant factors listed as assisting in the interpretation of whether a reasonable recipient would interpret the body of the message as having a commercial primary purpose.

Since the proposed third criteria is too subjective and do not provide sufficient objective guidance to senders, KeySpan disagrees with the Commission's suggestion of, after comments and information are received from the NPRM, including in the proposed third criteria an element expressly providing that a message may be deemed to have a commercial primary purpose if the message creates a false net impression that the message is noncommercial because it is deliberately structured to do so.¹⁵ KeySpan believes that determining whether a sender deliberately structured a message to give a false noncommercial impression is difficult to determine because it is too subjective. KeySpan is concerned that an email message may be deemed to have been deliberately

¹⁵ *Id.* at 23.

structured to give a false net impression that the primary purpose is noncommercial, when in fact the sender did not have the intent of deliberately misleading a recipient that the message is noncommercial, and believed the primary purpose of the email was noncommercial.

KeySpan respectfully requests that the sender's intent be incorporated in the proposed third criteria in determining the primary purpose of an email that contains commercial content and other content and that the Commission include a safe harbor provision protecting senders from the situations described above. By incorporating the sender's intent and a safe harbor provision in the proposed third criteria, senders who are not purposefully or intentionally trying to evade the CAN-SPAM Act will be protected from situations where senders believed the primary purpose of the email was noncommercial and did not intend to give a false net impression. KeySpan also respectfully requests that the Commission provide more concrete criteria or guidelines in determining whether a recipient reasonably interpreting the body of the message would likely conclude that the body of the message advertises or promotes a product or service.

An unnecessary compliance burden will result if the Commission does not provide a more concrete criteria or guidelines in determining whether a reasonable recipient interpreting the body of the message would likely conclude that the body of the message advertises or promotes a product or service. As the Commission suggests in the NPRM, legitimate industry concerned about the net impression of an email message containing commercial content and other content could copy test a planned email to determine whether a reasonable recipient would interpret the email to have a commercial

primary purpose.¹⁶ KeySpan believes that email senders, in order to be certain that their email messages do not create a false net impression, will need to incur the additional time, cost, burden and expense of gathering a testing group and testing the emails prior to sending the emails. KeySpan believes that copy testing emails would impose an unnecessary compliance burden, on legitimate industry, that could be avoided by having more concrete criteria or guidelines to follow in determining whether a reasonable recipient interpreting the body of the message would likely conclude that the body of the message advertises or promotes a product or service.

CONCLUSION

For all the foregoing reasons, KeySpan requests that the Commission remove the portion of the proposed second and proposed third criteria which would have an email message deemed commercial if a reasonable recipient in viewing the subject line alone would conclude that the email is an advertisement or promotion. If the Commission disagrees with the request, than in the alternative KeySpan requests that the Commission include some guidelines or criteria in determining whether a subject line of an email message would be determined by a reasonable recipient as advertising or promoting a product or service. KeySpan also requests that the Commission provide more concrete criteria or guidelines in determining whether a recipient reasonably interpreting the body of the message would likely conclude that the body of the message advertises or promotes a product or service. In addition, KeySpan requests that the Commission include a safe harbor provision pertaining to the proposed third criteria where a sender's intent is considered in determining the net impression of email messages that contain commercial content and other content. KeySpan does not support the Commission's

¹⁶ *Id.* at 24.

suggestion that a message may be deemed to have a commercial primary purpose if the message creates a false net impression that the message is noncommercial because it is deliberately structured to do so. Finally, KeySpan requests that the Commission confirm as transactional messages, emails with legally required notices sent to existing customers and emails directing customers to a company's website where customers may do business.

Respectfully submitted,

KEYSPAN ENERGY DELIVERY NEW
YORK AND KEYSPAN ENERGY
DELIVERY LONG ISLAND

By its attorney

A handwritten signature in black ink, appearing to read "Kristina Nifora", with a long horizontal flourish extending to the right.

Kristina Nifora
One MetroTech Center
Brooklyn, New York 11201
(718) 403-2768


Dated: Brooklyn, New York
September 10, 2004

CERTIFICATE OF SERVICE

I, Kristina Nifora, hereby certify that on this 10th day of September 2004, a copy of the foregoing, "Comments of KeySpan Energy Delivery New York And KeySpan Energy Delivery Long Island" was served by electronic mail to <https://secure.commentworks.com/ftc-can-spam/> and on the persons listed below:

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580
dclark@ftc.gov

I, Kristina Nifora, also hereby certify that the foregoing electronic copy is a true and correct copy of the paper original and that the paper original, with an original signature, is being filed with the Secretary of the Federal Trade Commission by overnight courier on September 10, 2004.


Kristina Nifora
Attorney for
KeySpan Energy Delivery
New York and KeySpan
Energy Delivery Long
Island